No. 76-749

In the Supreme Court of the United States

OCTOBER TERM, 1976

PFIZER INC., ET AL., PETITIONERS

v.

THE GOVERNMENT OF INDIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is filed in response to the Court's order of January 25, 1977, inviting the Solicitor General to express the views of the United States.

DISCUSSION

The issue is whether a foreign government is a "person" within the meaning of Section 4 of the Clayton Act, 38 Stat. 730, 731, 15 U.S.C. 15, entitled to maintain an action for treble damages based upon violations of the antitrust laws. Section 4 provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages[1]. The Act's

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[1] Former Section 7 of the Sherman Act, 26 Stat. 210, repealed in 1955, 69 Stat. 283, contained similar language.

definition of "person" includes corporations and associations existing under federal, territorial, state, or foreign law (15 U.S.C. 12), but makes no reference to governmental entities, foreign or domestic.

There appears to be no express legislative history indicating Congress' intent, one way or another, with respect to treble damage actions by foreign or domestic sovereigns. Whether foreign sovereigns are "persons" entitled to sue under Section 4 depends largely upon the general policy reflected in the statute, and the general policy of the United States opening its courts to foreign sovereigns.

The parties pressed upon the court below two competing analogies. Petitioners urged that the case was controlled by *United States* v. *Cooper Corp.*, 312 U.S. 600. The Court there held that the United States was not a "person" entitled to sue for damages under former Section 7 of the Sherman Act because Congress had provided the United States with an array of public remedies and sanctions not available to others who might be injured by antitrust violations. Respondents invoked *Georgia* v. *Evans*, 316 U.S. 159, where the Court held that the State of Georgia was a "person" entitled to sue for treble damages because it lacked the public enforcement powers of the United States, and thus had no redress for violation of the Sherman Act except the private action. The Court pointed out that *Cooper* had not ruled "that the word 'person,' abstractly considered, could not include a governmental body." 316 U.S. at 161.

The United States agrees with the *en banc* decision of the court of appeals that permitting foreign governments to sue for treble damages effectuates the congressional purpose to afford "any person" injured in his business or property by an

antitrust violation a treble damage remedy.[2] Compare *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236; *Radovich* v. *National Football League*, 352 U.S. 445, 454; *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660; *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648.[3]

The purposes of the treble damage remedy are to provide compensation to the victim of antitrust violations, and to supplement the federal government's limited enforcement capacity with private suits, so as to deter future violations. See, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266; *Zenith Radio Corp.* v. *Hazeltine Research,*

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[2]Petitioners rely on a general statute defining terms in the Revised Statutes, passed sixteen years before the Sherman Act, to show that Congress intended to define the word "person" so as to exclude states, territories, and foreign governments. Act of June 22, 1874, 18 Stat., pt. 1, 1092; Revisers' Note, 1 *Revision of the United States Statutes as Drafted by the Commissioners* 19 (1872); Pet. 12-14. But this proves too much. If Congress intended to exclude domestic states as well as foreign nations from the definition of "person," the words "any person" in the Sherman Act should not have been interpreted to include states, as the Court did in *Georgia* v. *Evans*, 316 U.S. 159. The Court has rejected the automatic approach petitioners advocate in favor of one which considered "[t]he purpose, the subject matter, the context, the legislative history and the executive interpretation of the statute" as "aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law." 316 U.S. at 161.

[3]In *Evans* the court also noted that it would be unreasonable to deny to the State of Georgia the right to sue for treble damages under the Sherman Act when the Court had previously held, in *Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390, that a municipality within the State had this right. *Georgia* v. *Evans*, *supra*, 316 U.S. at 162. Since a foreign corporation is permitted to sue for antitrust damages (15 U.S.C. 7, 12), it could do so even if its stock was wholly owned by a foreign government. Cf. *Amtorg Trading Corp.* v. *United States*, 71 F. 2d 524, 528-529 (C.C.P.A.). There is no reason why a foreign state's failure to trade through the corporate form should bar it from asserting antitrust injuries.

Inc., 395 U.S. 100, 130-131; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139. Permitting private antitrust damage suits by foreign governments would further these objectives.

In view of the express purpose of the antitrust laws to protect both domestic commerce and "commerce with foreign nations" (15 U.S.C. 1, 2, 12), and the longstanding principle that foreign sovereigns may sue in the courts of the United States to the same extent as a domestic corporation or individual (*The Sapphire*, 78 U.S. 164, 167-168),[4] we submit that Congress did not intend to exclude foreign governments from the categories of "persons" authorized to maintain antitrust treble damage suits.[5] The Court's statement in *Georgia* v. *Evans*, with the following substituted words, is equally applicable here: "We can perceive no reason for believing that Congress wanted to deprive a [foreign government], as purchaser of commodities shipped in [foreign] commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act" (316 U.S. at 162).

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[4]It is a well-established rule that a foreign nation is ordinarily accorded the same standing to sue in our courts as domestic plaintiffs. *The Sapphire*, *supra*; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 408-412; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134-135, n. 2. Thus, a foreign state has been accorded standing even where it brought suit under a federal statute that enumerated those who could sue, but did not include foreign states. *Swiss Confederation* v. *United States*, 70 F. Supp. 235, 236-237 (Ct. Cl.), certiorari denied, 332 U.S. 815. See, also, *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396, 399 (C.A. 2), certiorari denied, 275 U.S. 571.

[5]Such actions, of course, must meet the statutory requirement that the plaintiff allege and prove injury to its business or property. Cf. *Hawaii* v. *Standard Oil of Cal.*, 405 U.S. 251; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, No. 75-904, decided January 25, 1977.

Petitioners contend that if foreign governments may sue under the antitrust laws, the foreign economic relations of the United States will be injured, and grave inequities to American companies victimized by foreign cartels and expropriations will result.[6] As the court of appeals recognized, however (Pet. App. B3, n. 4), these are arguments to be addressed to Congress. Indeed, in certain limited circumstances, Congress had made special provision for collective activity by American firms in order to resist foreign cartels. *E.g.*, The Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61-65; see *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199. Moreover, any policy considerations justifying special antitrust treatment for United States companies that do business with foreign governments do not justify implying a legislative intent to close American courts to foreign governments that have been the victims of antitrust violations perpetrated by American companies.[7]

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[6]This argument is premised in part on the ground that if, after a foreign nation expropriated the properties of American companies and those companies then retaliated by engaging in a group boycott of the product produced from the seized properties, the foreign nation could sue the American companies in our courts under the antitrust laws. However, the Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, Section 4(a), 90 Stat. 2891, 2894, 28 U.S.C. 1605(a)(3), 1607, permits in certain cases a counterclaim to a suit by a foreign state alleging that the foreign state has taken property in violation of international law. In any event, the possibility that allowing foreign governments to sue might cause inequities in an occasional unusual situation hardly supports denying relief to foreign governments that are the innocent victims of antitrust violations.

[7]In their Joint Reply Brief, page 7, petitioners refer to the exemption from punitive damages for foreign nations under the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, Section 4(a), 90 Stat. 2894, 28 U.S.C. 1606. Petitioners also refer to the exemption for foreign nations from the pre-merger notification requirement of Section 7A of

The Department of State, which is primarily responsible for the conduct of this Nation's foreign relations, has advised that it would anticipate no "foreign policy problems" from construing Section 4 of the Clayton Act to permit foreign governments to sue for treble damages.[8]

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the Clayton Act. Pub. L. No. 94-435, Title II, Section 201, 90 Stat. 1390; 41 Fed. Reg. 55488, 55490. Petitioners' reliance upon these statutes is misplaced; they shed no light upon whether Congress intended to deny foreign governments the right to sue provided in Section 4.

Greenspan v. *Crosbie*, [1976] Fed. Sec. L. Rep. (CCH), para. 95,780 (S.D. N.Y., No. 74 Civ. 4734, November 23, 1976), which petitioners cite in their Joint Reply Brief, page 8, actually demonstrates the kind of clear legislative intent required to exclude a foreign government from coverage under a federal statute. In *Greenspan*, the court found that the word "person" in the Securities Exchange Act of 1934 did not cover the Province of Newfoundland. *Greenspan* v. *Crosbie*, *supra*, at p. 90,827. The court observed, however, that the Securities Act of 1933 included in the definition of "person" a "government or political subdivision," but that this language was dropped from the definition of "person" in the Securities Exchange Act of 1934. *Greenspan* v. *Crosbie*, *supra*, at p. 90,827. The court also noted that in 1975, after the suit in *Greenspan* was filed, Congress amended the statute again to include a government or political subdivision. The court reasoned, therefore, that Congress would not have included a government or a political subdivision in the 1975 amendments unless it believed these entities were not covered by the 1934 Act. *Greenspan* v. *Crosbie*, *supra*, at p. 90,827. There appears to be no similar evidence of Congressional intent to deny a foreign state the right to sue under Section 4 of the Clayton Act.

[8] The views of the Department of State were expressed in the attached letter from The Legal Adviser to the Department of Justice, which was submitted to the court of appeals when it reconsidered this case *en banc*.

In sum, while the question presented is not without importance, we submit that the court of appeals correctly decided it.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General.

DONALD I. BAKER,
Assistant Attorney General.

BARRY GROSSMAN,
FREDERIC FREILICHER,
Attorneys.

MARCH 1977.

[933-1977-03]

APPENDIX A

DEPARTMENT OF STATE

THE LEGAL ADVISER
WASHINGTON

August 10, 1976

Mr. Donald I. Baker
Acting Assistant
Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Re: Pfizer Inc. v. *Government of India*

Dear Mr. Baker:

We understand that the above entitled litigation has been set for a rehearing *en banc* by the United States Court of Appeals for the Eighth Circuit, on the question of whether a foreign government is a "person" entitled to bring antitrust claims based on injury to its business or property, under Section 4 of the Clayton Act, 15 U.S.C. 15. This is to advise that the Department of State would not anticipate any foreign policy problems if the Court of Appeals *en banc* should reaffirm the Court's earlier decision as well as the position of the United States Government—namely, that foreign governments are "persons" within the meaning of Clayton Act §4.

Moreover, we are not overly concerned about the possibility that a foreign government which has expropriated property of American companies may bring an antitrust action in the United States, challenging a combined resistance among the American companies to the expropriation. If such a case should arise, it is

quite possible that the American companies would have a counterclaim with respect to the legality of the expropriation under international law. See, *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 44 U.S.L.W. 4665, 4670, 4673 (Appendix I n. 1); cf. *National City Bank* v. *Republic of China*, 348 U.S. 356.

Sincerely,
/s/ Monroe Leigh

Monroe Leigh